Attorney Docket No.: 13105.1 **BOX TTAB NO FEE**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Acorn Alegria Winery,
Dba Acorn Winery

Opposer,

v.

Sweely Holdings, LLC

Applicant.

Opposition No. 91/168,790
Appln. Serial No. 78/497,107,
78/497,110, 78/497,114

APPLICANT'S TRIAL BRIEF

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I. STATEMENT OF THE CASE AND DESCRIPTION OF THE RECORD

After thirty-two years of success in the equestrian business, Applicant has begun a new venture in the wine industry. During the past thirty-two years, Applicant has continuously used the mark ACORN HILL FARM for all of its equestrian activities. Due to the success of Applicant's equestrian business, this mark has developed considerable fame and recognition throughout the United States and internationally. Having already invested nearly a third of a century in developing the ACORN HILL FARM mark, Applicant has naturally decided to take advantage of this mark in its winemaking venture. Thus, on October 8, 2004, Applicant filed intent to use applications for the registration of Serial No. 78/497,107 for ACORN HILL WINERY; Serial No. 78/497,110 for ACORN HILL ESTATE; and Serial No. 78/497,114 for ACORN HILL VINEYARDS, all for "wine and potable spirits" in Class 33. After a subsequent search of Office records by two different examiners with the United States Patent and Trademark Office found no similar registered or pending marks that would bar registration of any of the three marks, Applicant's marks were published in the *Official Gazette* on September 27, 2005 at page TM 1635.

Opposer, Acorn Alegria Winery, relying on its registered mark, Reg. No. 2,061,738 for ACORN for "wine" in Class 33, filed a Consolidated Notice of Opposition on January 24, 2006, claiming a likelihood of confusion between Opposer's mark and Applicant's marks. Applicant defended, filing its Answer on February 27, 2006. Applicant contends that no likelihood of confusion exists because the marks differ in sight, sound and commercial impression, and the realities of the wine industry and wine

consumers are such that consumers are very unlikely to confuse wines bearing Applicant's marks with those bearing Opposer's mark.

Applicant generally concurs with Opposer's statement of the record in this case with the additional note that the record also contains the entire USPTO file for each of the three applications presently at issue.

II. STATEMENT OF THE ISSUE

Whether confusion is likely as to source among sophisticated consumers of wine between Opposer's ACORN branded wine produced in Sonoma County, California and Applicant's wines produced in Madison,Virginia and bearing the ACORN HILL WINERY, ACORN HILL ESTATE, and ACORN HILL VINEYARDS mark, where the marks evoke distinct commercial impressions?

III. STATEMENT OF FACTS

A. Applicant's Long, Continuous Use of the Acorn Hill Farm Mark.

The Sweely family first adopted the mark Acorn Hill Farm in May of 1975 when the family became involved in training, showing, and breeding horses. (Jess Sweely deposition dated Feb. 2, 2007, at 10:1-11:1.) (Hereafter "Sweely dep.".) The Sweelys continued to use the Acorn Hill Farm mark in connection with their equestrian activities, and on June 12, 1985, the Sweelys registered the name Acorn Hill Farm with the American Horse Shows Association, Inc. (Sweely dep. at 12:1 – 13:16 and Exhibit 2 thereto (American Horse Shows Association Registration Certificate).) On April 4, 1991, the Sweelys incorporated Acorn Hill Farm, Incorporated in the State of Virginia, with Sharon Sweely as the sole stockholder. (Sweely dep. at 14:16-22 and Exhibit 3 thereto

(Certificate of Good Standing from Virginia State Corporation Commission).) The ACORN HILL FARM mark was registered on October 17, 2006, for "horse training, entertainment in the nature of equestrian competitions" in Class 41. (*See* noticed copy of Reg. No. 3,158,120.) On December 5, 2006, the ACORN HILL FARM mark was registered for "horse farms; horse breeding and stud services" in class 44. (*See* noticed copy of Reg. No. 3,180,315.)

For the past 32 years, Acorn Hill Farm has been in the business of breeding, showing and selling horses, including Irish Sport Horses, German Crosses, Holsteiners, and Hanoverians, among others. (Sweely dep. at 15:8-21.) During this period, Acorn Hill Farm has developed into a successful and highly regarded sport horse and thoroughbred training and breeding business. Acorn Hill Farm currently spans approximately 200 acres in the foothills of the Blue Ridge Mountains of Virginia. (Sweely dep. at 18:2-7.) The Farm now stables more than 150 horses and employs 10 – 15 employees at any given time. (Sweely dep. at 15:22-24 and 18:8-11.) Acorn Hill Farm maintains a busy showing and eventing schedule, showing horses approximately thirty to forty weeks per year in events all over the Eastern United States and internationally, and entering horses in at least fifteen competitive events throughout the year (Sweely dep. at 15:25–17:2.) One of the primary purposes for entering horses in shows and events is marketing. These shows and events allow Acorn Hill Farm to display their performance stallions that are available for breeding as well as the various horses that are available for sale. Acorn Hill Farm spends approximately $100,000 to $150,000 marketing its brand each year by entering shows and events, sponsoring certain

events, and advertising in trade publications. (Sweely dep. at 18:12 – 19:8 and Exhibit 6-8 thereto (various advertisements in event brochures and trade publications).)

Over the years, Acorn Hill Farm has developed a national reputation as one of the top breeding facilities in the United States and has received considerable acclaim in several published articles. (Sweely dep. at 20:12-25 and Exhibits 4 and 5 thereto (Articles from Charlottesville Daily Progress).) Having spent the past 32 years developing the Acorn Hill Farm brand in the horse training and breeding arena, the Sweelys have now branched out into the winemaking business.

B. The Sweelys Expand Their Interests to Winemaking.

The Sweelys fully intend to capitalize on the market value and reputation of the Acorn Hill Farm mark in their new venture in the wine business. (Sweely dep. at 40:1-15.) To that end, On October 8, 2004, the Sweelys filed the intent to use applications at issue in this opposition: Serial No. 78/497,107 for ACORN HILL WINERY; Serial No. 78/497,110 for ACORN HILL ESTATE; and Serial No. 78/497,114 for ACORN HILL VINEYARDS, all for "wine and potable spirits" in Class 33. In addition, on November 14, 2005, the Sweelys reserved the domain names "acornhillwinery.com" and "acornhillvineyard.com" for use with its winery business. (Sweely dep. at 37:8-20 and Exhibit 10 thereto (receipt for reservation of domain names).) In addition, the Sweelys selected labels for their wines that clearly draw a strong connection between their horse business and their winery. These labels depict a stylized image of a galloping horse and are cut at the top to resemble the Blue Ridge Mountains, where the farm and the winery are located. (Sweely dep. at 39:7-24 and Exhibits 11 and 12 thereto (Acorn Hill Winery

labels).) Finally, the Sweelys have constructed a cross-country course for use in equestrian events on 75 acres of the 300 acre parcel of land upon which their vineyards are currently planted and their winery and tasting room are being built. (Sweely dep. at 25:10 – 26:8.) The Sweelys intend to host equestrian events at this cross-country course and use those events to promote the Acorn Hill winery. (Id.)

Contrary to Opposer's assertions, Acorn Hill Winery has already begun to establish its presence in the wine industry. On September 26, 2006, Acorn Hill Winery received its basic permit from the Alcohol Tobacco and Tax Trade Board. (Id. at 35:24 – 36:17 and Exhibit 9 thereto (Basic Permit).) Although Acorn Hill Winery has not yet sold wine bearing its mark, it will likely do so by the end of 2007. (Sweely dep. at 35:17-23.) Acorn Hill Winery has already been included on Virginia's famous Monticello Wine Trail. (Id. at 41:17 – 45:16 and Exhibit 13 thereto (Monticello Wine Trail Brochure).) Moreover, Acorn Hill Winery was featured in an article in the Virginia Wine Gazette and recognized in an article in the *Charlottesville Daily Progress* earlier this year. Finally, Acorn Hill Winery has already been listed in the 2007 edition of *Virginia Wineries*, a publication that is incorporated into a Virginia tourism magazine and distributed freely by the State of Virginia. (Sweely dep. at 52:9 – 54:3 and Exhibit 16 thereto (Virginia Wineries).)

C. The Acorn Mark for Wines is Not Particularly Strong or Famous.

Opposer operates a very small regional winery located in the Russian River Valley in Sonoma County, California. Opposer's winery has a very limited production even by boutique winery standards, producing less than 3000 cases of wine annually (William

Nachbauer deposition dated Nov. 20, 2006, at 22:16-21, hereafter "Nachbauer Nov. 2006 dep."), of which only about 200 cases are actually produced on site. (William Nachbauer deposition dated Aug. 22, 2006, at 16:9-19, hereafter "Nachbauer Aug. 2006 dep.".) The winery is open for tastings and visitors by appointment only, and receives approximately 50-100 visitors per month. (Nachbauer Nov. 2006 dep. at 27:3-7.)

To the extent Opposer has developed recognition of its mark in the wine industry, such recognition is regional in nature, and Opposer's marketing seldom targets consumers outside of the state of California. Opposer spent approximately $60,000 marketing its business last year, with the bulk of those expenditures going toward entering Opposer's wines in competitions, and public tastings and producing printed materials that are distributed with Opposer's wines. (Nachbauer Aug. 2006 dep. at 31:1-10.) Mr. Nachbauer explained that the bulk of his advertising money is generally spent on the printed materials included in distribution with Opposer's wines. The next most significant outlay is for participation in tasting events and competitions. Mr. Nachbauer testified that Opposer attends approximately ten of these marketing type events annually, (Nachbauer Nov. 2006 dep. at 55:15-20), and Opposer submitted representative materials from three of these events into the record during Mr. Nachbauer's testimony deposition. These events are indicative of the local focus of Opposer's marketing efforts. The first of these events, "Tasting 2005" was held in San Francisco, California and hosted by the Family Winemakers of California. (Exhibit 24 to Nachbauer Nov. 2006 dep. (copy of brochure from Tasting 2005).) Mr. Nachbauer testified that this was a local event attended only by small California wineries. (Nachbauer Nov. 2006 dep. at 71:21 – 72:4.)

The second event was even more localized. The "Grape to Glass Weekend" was hosted by the Russian River Valley Wine Growers Association and included tours of various vineyards in the Russian River Valley Appellation. (Id. at 72:5 – 73:8 and Exhibit 25 thereto (Grape to Glass Weekend brochure).) Finally, the third event, the "15th Annual Zinfandel Festival" was held in San Francisco. While this event may have included a few wineries from outside California, it was hosted in California and attended primarily by California wineries who produce Zinfandel wines. (Id. at 73:9 – 74:18.)[1]

IV. ARGUMENT

A. Analysis of the DuPont Factors Reveals No Appreciable Likelihood of Confusion.

In a trademark opposition, the Opposer bears the burden of showing by a preponderance of the evidence that confusion between the Applicant's mark and Opposer's mark is likely.[2] Massey Junior College, Inc. v. Fashion Inst. of Tech., 492 F.2d 1399, 1403, 181 USPQ 272, 276 (CCPA 1974). To meet this burden, Opposer must show that "numerous ordinar[il]ly prudent purchasers are likely to be misled or confused as to the source of the product in question because of the entrance in the marketplace of

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[1] On redirect, Mr. Nachbauer testified that Opposer had on occasion attended small events outside of California, including a small charity event hosted by a distributor in a bed and breakfast in New Hampshire. (Nachbauer Nov. 2006 dep. at 76:12 – 77:6.) However, this appears to be the only evidence of record indicating Opposer's participation in marketing events outside of California.

[2] At least one reason for placing this burden upon the Opposer is the fact that an examiner has already made a determination that the mark at issue is registerable. In the present case, it is clear that the Examiner's search would have uncovered Opposer's mark, yet the Examiner approved Applicant's mark for registration. (See Office Actions for Application Nos. 78/497,107, 78/497,110 and 78/497,114.) Under the circumstances, then, it is most appropriate that the burden be placed squarely upon Opposer to prove that confusion is likely.

[Applicant's] mark." Banfi Prods. Corp. v. Kendall-Jackson Winery, Ltd., 74 F. Supp.2d 188, 195, 52 USPQ2d 1828, 1835 (E.D. N.Y. 1999) (quoting Estee Lauder, Inc. v. The Gap, Inc., 108 F.3d 1503, 1510 (2nd Cir. 1997)). It is not sufficient that confusion be merely possible, rather, "likelihood of confusion requires that there be a probability of confusion." Id.; Rodeo Collection, Ltd. v. West Seventh, 812 F.2d 1215, 1217, 2 USPQ2d 1204, 1206 (9th Cir. 1987).

In determining whether confusion is likely between two marks, the Board must at a minimum consider the thirteen factors set forth by the CCPA in In re E.I. DuPont deNemours & Co., 476 F.3d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973). While it is true that the Board often places significance on two of these factors, the similarity of the mark and similarity of the goods, these factors should not be given talismanic properties. The DuPont factors are fluid and designed to aid the Board in analyzing likelihood of confusion as a whole. Thus, the Board does not "count beans" or rigidly give weight to any particular factors, but instead looks at the entire record to determine likelihood of confusion. See Century 21 Real Estate LLC v. Century Ins. Group and Century Surety Co., No. CIV-03-0053-PHX-SMM, 2007 WL 484555 at *5 (D. Ariz. 2007). Here, all of the relevant DuPont factors clearly demonstrate that there is no likelihood of confusion between Applicant's and Opposer's marks.

1. Applicant's and Opposer's Marks are Substantially Dissimilar in Appearance, Sound, Connotation, and Commercial Impression.

It is well-established that when determining whether two marks are confusingly similar, the marks must be compared in their entireties and must not be dissected into

their component parts. In re Nat'l Data Corp., 753 F.2d 1056, 1058, 224 USPQ 749, 751 (Fed. Cir. 1985); see also, Playboy of Miami Inc. v. John B. Stetson Co., 426 F.2d 394, 165 USPQ 686 (CCPA 1970) (holding that TTAB treatment of the word "Playboy" as the dominant element of the marks amounted to improper dissection of the marks); Champagne Louis Roederer, S.A. v. Delicato Vineyards, 148 F.3d 1373, 47 USPQ2d 1459 (Fed. Cir. 1998) (affirming TTAB determination that the mark CRYSTAL CREEK must be read in its entirety and was not confusingly similar to the mark CRISTAL). When comparing marks in their entireties, all of the features of the marks should be considered. The focus should be on their overall impressions, not individual features. Homeowners Group, Inc. v. Marketing Specialists, Inc., 931 F.2d 1100, 18 USPQ2d 1587 (6th Cir. 1991). It is impermissible to focus on "prominent" words or symbols to the detriment of the mark as a whole. Little Caesar Enters., Inc. v. Pizza Caesar, Inc., 834 F.2d 568, 4 USPQ2d 1942 (6th Cir. 1987).

When compared in their entirety, Applicant's ACORN HILL mark and Opposer's ACORN mark are dissimilar in sight, sound and commercial impression. Whereas Opposer's mark consists of a single noun, Acorn, Applicant's mark consists of three separate words; Acorn Hill and either Winery, Estate or Vineyards. Visually, Applicant's mark is nearly twice as long as Opposer's. Moreover, Opposer's and Applicant's marks evoke starkly dissimilar commercial impressions in the minds of consumers. Opposer's mark contains the word "Acorn" standing alone. This solitary noun evokes thoughts of the small fruit of an oak tree and, in common vernacular, is used as a metaphor to truthfully describe the size of a person or an object. Indeed, Opposer's own website

proclaims that "Acorn Winery is named to honor the many old oak trees in our vineyards, for the oak used in the barrels where our wines mature, and in recognition of our very small size." (Nachbauer Nov. 2006 dep. Exhibit 5.) By contrast, Acorn Hill is a whimsical reference to a knoll, mount, mound and/or topographical prominence. Grammatically, the addition of the noun "Hill" converts the word Acorn from a noun (as in Opposer's mark) to an adjective. Adjectives are descriptive terms which are dependent on the nouns they describe to create a concrete image. For example, the word "Blue" standing alone creates an abstract commercial impression of a color. But used to modify a noun, the word "Blue" can create a very concrete and distinct image, such as, for example, the phrase "Blue Door." The adjective, by its nature draws the reader's attention to the noun which it describes. The addition of the prominent noun, "Hill" directs the reader's imagination to an idyllic rolling landscape or scenic hillside. In cases where there are recognizable differences in the alleged conflicting marks the addition of other material to one of the marks has been held sufficient to render the marks, as a whole, distinguishable. In re Shawnee Milling Co., 1985 WL 72016, 225 USPQ 747 (TTAB Feb. 5, 1985).

The Board decided an almost identical question in Delicato Vineyards, 148 F.3d at 1374-1375, 47 USPQ2d at 1461. In that case, Champagne Louis Roederer, S.A. ("Roederer") opposed the application of Delicato Vineyards for registration of the mark "CRYSTAL CREEK" for wines. Roederer claimed Delicato's mark would likely cause confusion with Opposer's marks "CRISTAL" and "CRISTAL CHAMPAGNE" for champagne. Analyzing the DuPont factors, the Board determined that the marks were

used for the same class of goods, that those goods traveled in the same trade channels, and that the goods were purchased by the same or similar customers. The Board also found that Roederer's mark was very strong in the United States and abroad. Despite these facts in Opposer's favor, the Board ultimately determined that the marks were substantially dissimilar because they "evoked very different images in the minds of relevant consumers: while the former suggested the clarity of the wine within the bottle or the glass of which the bottle itself was made, the latter suggested a very clear (and hence probably remote from civilization) creek or stream."[3] Id.

Much like Delicato Vineyards, Applicant's mark differs substantially from Opposer's mark in sight, sound and commercial impression on the consumer due to the addition of a noun depicting a topographical location, "Hill" as opposed to "Creek." Unlike Delicato Vineyards however, none of the other relevant DuPont facts favor Opposer in this case.

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[3] The cases cited by Opposer for the proposition that "addition of a term or terms to a registered mark does not obviate the similarity between the marks or likelihood of confusion" are unavailing because the additional words added to the marks in those cases all failed to create a commercial impression distinct from that of the opposing mark. See, e.g., In re Chatam Int'l, Inc., 380 F.3d 1340, 1342, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004) ("[T]he Board determined that both marks convey the commercial impression that a name, GASPAR, is the source of related alcoholic beverages, tequila and beer or ale."); Coca-Cola Bottling Co. v. Joseph E. Seagram & Sons, Inc., 526 F.2d 556, 188 USPQ 105 (CCPA 1975) (holding that the relationship between BENGAL and BENGAL LANCER was very close and the addition of the word "Lancer" did not create a distinct commercial impression); Lilly Pulitzer v. Lilli Ann Corp., 376 F.2d 324, 325, 153 USPQ 406, 408 (CCPA 1967) (finding a similarity of connotation between LILLI ANN and THE LILLY); In re El Torito Rests. Inc, No. 597,060, 1988 WL 252343, 9 USPQ2d 2002 (TTAB Dec. 23, 1988) ("The addition of the descriptive word "COMBO" does not alter the meaning of the word 'MACHO', nor does it change the connotation of the mark from that of 'MACHO' alone.").

2. Purchasers of Applicant's and Opposer's Goods Are Sophisticated and Careful Consumers.

Generally, the more sophisticated, knowledgeable and careful the consumers, the less likely they will be confused by allegedly similar marks. A sophisticated consumer's purchasing decisions are not primarily based on a comparison of the marks, per se, but are based on a comprehensive understanding of the products or services in question. As a result, courts have recognized that "the more sophisticated and careful the average consumer of a product is, the less likely it is that similarities in trade dress or trade marks will result in confusion concerning the source or sponsorship of the product." Bristol-Myers Squibb Co. v. McNeil P.P.C., Inc., 973 F.2d 1033, 1046, 24 USPQ2d 1161, 1174 (2nd Cir. 1992).

Courts have recognized that consumers of fine wines such as those sold by Opposer and intended to be sold by Applicant are largely sophisticated consumers who make purchasing decisions after tasting the products and often after visiting a winery. As the court held in Banfi Prods. Corp.:

> [W]ith respect to the sophistication of wine consumers, studies, like the one published by *The U.S. Wine Market Impact Databank Review and Forecast*, have indicated that wine drinkers tend to be older, wealthier, and better educated than the average population. Specifically, wine consumers "60 and over account for some 28% of all wine volume, while those between 50 and 59 consume another 22 percent." In addition, "[t]he wine consumer is generally an affluent one—more than forty-one percent have incomes of at least $60,000." Finally, survey results indicate that "[a]t least half of the drinkers for all the wine types (with the exception of Sangria) have some college education. . . "

74 F. Supp.2d at 195, 52 USPQ2d at 1835 (citations omitted). Moreover, Mr. Nachbauer testified that approximately 50% of the wine sold by Opposer's winery is sold directly to

individual consumers, and the great majority of these individual consumers have visited Opposer's winery at least once prior to purchasing Opposer's wines. (Nachbauer Aug. 2006 dep. at 26:6 – 27:4.) Another approximately 33% of Opposer's wines are sold to distributors who are in the business of purchasing and distributing wines. (Id. at 28:17-21.) Thus, pursuant to Mr. Nachbauer's own testimony, nearly 85% of the consumer's of Opposer's wines are considerably more knowledgeable about wines than the average population. These consumers are considerably less likely to be confused by Applicant's mark. This factor strongly favors a determination that there is no likelihood of confusion between Opposer's and Applicant's marks.

3. There is No Evidence of Actual Confusion.

As is set forth more fully in Applicant's Motion to Exclude Opposer's Hearsay Testimony, there is no admissible evidence on this record of any actual confusion between Opposer's and Applicant's marks. Opposer offers inadmissible hearsay testimony of an "employee" of a vendor confusing the names "Acorn" and "Acorn Hill" in determining whom to bill for a service. Counsel for Applicant objected to this testimony during Mr. Nachbauer's deposition and has now moved to strike such evidence as a classic example of inadmissible hearsay, for the reasons set forth in the accompanying motion.

Even if the Board were to accept this evidence, it is of little value, since Mr. Nachbauer himself admitted that neither the lab nor the employee are customers of Acorn. (Nachbaur Nov. 2006 dep. at 75:18 - 76:8.) Confusion of non-customers is of little weight in determining whether actual confusion exists under the DuPont analysis.

Homeowners Group, Inc. v. Home Marketing Specialists, Inc., 931 F.2d 1100, 18 USPQ2d 1587 (6th Cir. 1991) (confusion is given considerably less weight in the absence of "'chronic mistakes and serious confusion of actual customers'"). Thus, this factor does not weigh in favor of finding likelihood of confusion.

4. The Extent of Potential Confusion is De Minimis.

One factor in determining whether any potential confusion is substantial or de minimis is whether the products are in close proximity. Polaroid Corp. v. Polorad Elec. Corp., 287 F.2d 492, 128 USPQ 411 (2nd Cir. 1961). Under this factor, the Board must assess whether the two products at issue will compete with each other in the same market based on the nature of the products, the nature of the industry and the nature of the relevant market. *See* Banfi Prods., 74 F. Supp. at 197, 52 USPQ2d at 1837. Due to the regional nature of the wine industry, and the importance placed by consumers on the geographic region in which a wine is produced, the potential for confusion in this case is de minimis.

The wine industry is, by its nature, regional, and consumers focus on the region of origin when purchasing wines. As the Banfi court recognized:

> In terms of the wine industry as a whole, it is well settled that retail wine stores typically segregate wine according to geographic origin, i.e., California, Italy, and Chile. Similarly, restaurant wine lists . . . at a minimum include some indication of each wine's geographic origin, along with the vinter's name and the year and price of the wine.

Id. at 194, 52 USPQ2d at 1834. Applicant's and Opposer's wineries are located nearly 3000 miles apart. Opposer's winery is located in the Russian River Valley of Sonoma County, California. Opposer testified that Sonoma County, CA has a strong reputation in

the wine industry. (Nachbauer Nov. 2006 dep. at 74:19-24.) The evidence of record also reveals that Opposer's marketing efforts are primarily focused on this regional market. Applicant's winery, on the other hand, is located in Madison, Virginia. Although Virginia is an emerging region in the winemaking industry, "[b]ecause of the realities of climate, the state may primarily support smaller boutique wineries that mostly serve local markets." (See Exhibit 16 to Sweely dep. at 5 (Article by Paul Franson, Regional Editor of Wines & Vines).)

The distinct regional differences between Opposer's and Applicant's wineries impacts the proximity of their products in yet another way. The climates of Sonoma Valley and northern Virginia accommodate entirely different varietals of grapes. It is not surprising, then, that only one of the varietals of wine intended to be produced by Applicant has ever been produced and bottled by Opposer. (Sweely dep. at 34:5-11; Nachbauer Nov. 2006 dep. at 20:14-25 and Exhibit 4 thereto (listing varietals produced).) Thus, not only will Applicant's and Opposer's wines be segregated by region, they will also largely be segregated by varietals.

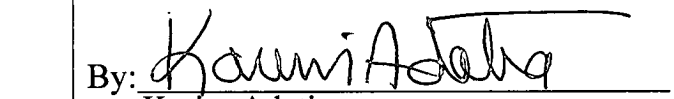
V. CONCLUSION

Based on the foregoing analysis, it is clear that Opposer has failed to meet its burden of showing a likelihood of confusion among consumers of wines bearing Opposer's and Applicant's marks. First and foremost, Applicant's mark simply differs from Opposer's mark in sight, sound and commercial impression. Moreover, in an industry where region of origin is emphasized and consumers are generally more sophisticated and knowledgeable than the average public, there is little potential for

confusion of these distinct marks on wines produced nearly 3000 miles apart and sold primarily to a regional market. Accordingly, this opposition should be denied and the Board should issue the registration of Applicant's marks.

Respectfully submitted,

SWEELY HOLDINGS, LLC

By: 

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Dated: July 13, 2007

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **APPLICANT'S TRIAL BRIEF** was served on counsel for Opposer, this 13th day of July, 2007, by sending same via electronic mail and U.S. First Class Mail, postage prepaid, to:

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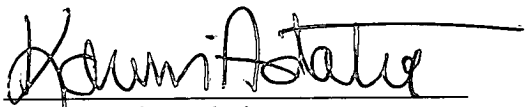

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